72-1733

FILE COPY

Supreme Court, U. S.
FILED
JUN 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1733

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Wallace L. Duncan, Esq.
Counsel for Petitioner
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Of Counsel

Watson & Hoffe

TABLE OF CONTENTS

OPINIONS BELOW---------- 2

JURISDICTION---------- 2

QUESTIONS PRESENTED FOR REVIEW----- 3

CONSTITUTIONAL PROVISION INVOLVED-- 4

STATUTES AND REGULATIONS INVOLVED-- 4

STATEMENT OF THE CASE---------- 5

REASONS FOR GRANTING THE WRIT------ 7

REASONS FOR GRANTING THE WRIT

IN HOLDING THAT LOCAL BOARD CONSIDERATION OF THE MERITS OF PETITIONER'S POST-INDUCTION CONSCIENTIOUS OBJECTOR CLAIM DID NOT CONSTITUTE A DE FACTO REOPENING AND WOULD NOT AFFECT HIS RIGHT TO IN-SERVICE RELIEF, THE NINTH CIRCUIT PLACED PETITIONER SQUARELY WITHIN A "NO MAN'S LAND" THAT THE SUPREME COURT HAS ALREADY STATED WAS "INTOLERABLE" AND HAS REACHED A DECISION ON IMPORTANT LEGAL ISSUES DIRECTLY CONTRARY TO DECISIONS IN OTHER CIRCUITS.

CONCLUSION---------- 24

APPENDIX A---------- 26

APPENDIX B---------- 32

APPENDIX C---------- 36

APPENDIX D---------- 37

CASES CITED

Baker v. Laird,
316 F. Supp. 1 (N.D. Cal. 1970)----------17

Ehlert v. United States,
402 U.S. 99 (1971)--------13,14,15

Estep v. United States,
327 U.S. 114 (1946)-=-----21

United States v. Alioto,
469 F.2d 722 (1st Cir. 1972)----------12

United States v. Cotton,
346 F. Supp. 691 (S.D.N.Y.1172)----------12

United States v. England,
348 F.Supp. 851 (W.D. Mo. 1971)----------12

United States v. Musser,
___ F.2d ___, (9th Cir. May 2, 1973)----------9,10

United States v. Shomock,
462 F.2d 338 (3d Cir.1972)-12,16

United States v. Takala,
5 SSLR 3773 (E.D.Mich.
1972)----------12

United States v. Usdin,
6 SSLR 3039 (E.D.N.Y.
1972)----------12,18,19

United States v. Waldron,
___ F.2d ___ (7th Cir.
February 8, 1973); peti-
tion for cert. filed
___ U.S.L.W. ___ (U.S.
May 14, 1972) (No. 72-
6748)----------12,20,22,23

United States v. Ziskowski,
465 F.2d 480 (3rd Cir.
1972)----------10,12

Wright v. Ingold,
445 F.2d 109 (7th Cir.
1971)----------12

REGULATIONS CITED

Army Regulation 635-20,
August 15, 1970----------15, 17

Department of Defense Directive No. 1300.6,
May 10, 1968----------15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Christopher Joseph Musser respectfully prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 2, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported but is set forth in Appendix A. It affirmed petitioner's Judgment of Conviction for failing to submit to induction into the Armed Forces of the United States in violation of 50 App. U.S.C. §462(a). Petitioner was tried by the court in the District Court on December 20, 1971, and on January 6, 1972 he was found guilty as charged. There is no written opinion of that court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 2, 1973. On June 1, 1973 Justice Douglas signed an order extending the time for the filing of a petition for certiorari to and includ-

ing June 22, 1973.

QUESTIONS PRESENTED FOR REVIEW

I Whether petitioner's local draft board deprived him of his right to Due Process of Law as guaranteed in the United States Constitution by considering his post-induction order claim to conscientious objector status on the merits, as shown by its finding that the claim lacked sincerity, and by characterizing their denial of that claim as a refusal to reopen his classification, thereby denying him his administrative rights attendant to a classification decision?

II Whether the course of conduct taken by petitioner's draft board in denying his post-induction notice claim to conscientious objector status on a finding of insincerity, together with

the applicable Selective Service and Army regulations would have permitted the Army to reject his claim for in-service conscientious objector status, thereby placing him in a "no man's land" and denying him the rights to Due Process of Law guaranteed him by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment

No person shall . . . be deprived of life, liberty or property without due process of law . . .

STATUTES & REGULATIONS INVOLVED

The regulations involved are Selective Service Regulations, part 1625, 32 C.F.R. 1625.2, 1625.4, 1625.11-12-13-14. Because these provisions are lengthy, their pertinent text is set forth as Appendix B. Also involved are

Army Regulation 635-20, effective August 15, 1970, and Department of Defense Directive No. 1300.6, effective May 10, 1968. Because the provisions of these regulations are lengthy, the pertinent portions of the texts are set forth in Appendices C and D, respectively.

STATEMENT OF THE CASE

On December 5, 1967, defendant, appellant and petitioner (hereinafter referred to as petitioner) registered with Local Board No. 25, Marin County, San Rafael, California. On February 25, 1970, petitioner was classified 1-A by Local Board No. 25 and on September 15, 1970, petitioner was ordered to report for induction into the Armed Forces on October 14, 1970. On September 21, 1970, petitioner requested and received

a Special Form for Conscientious Objector. At that time petitioner was told by a secretary at Local Board No. 25 that the Form would be considered if it was returned within a certain period of time. On September 28, 1970, the completed Form was returned by petitioner to Local Board No. 25. On September 29, 1970, the Local Board met and considered petitioner's claim to conscientious objector status. The summary of that meeting of the Local Board shows that:

> "Local Board reviewed registrant's completed claim. It was their determination that the claim lacked sincerity. Registrant must report for induction."

The entry in the Minutes of Action by Local Board and Appeal Board and on Appeal to the President for September

29, 1970 states:

"Completed claim reviewed. Claim lacks sincerity."

Nevertheless, on September 29, 1970, the Local Board advised Petitioner that it had not reopened his classification and had not reclassified him and that he must report for induction. On December 21, 1970, the Local Board advised petitioner of his continuing duty to report and ordered him to report for induction on January 19, 1971. On January 19, 1971, petitioner reported for induction but refused to submit to induction.

REASONS FOR GRANTING THE WRIT

IN HOLDING THAT LOCAL BOARD CONSIDERATION OF THE MERITS OF PETITIONER'S POST-INDUCTION CONSCIENTIOUS OBJECTOR CLAIM DID NOT CONSTITUTE A DE FACTO RE-

OPENING AND WOULD NOT AFFECT HIS RIGHT TO IN-SERVICE RELIEF, THE NINTH CIRCUIT PLACED PETITIONER SQUARELY WITHIN A "NO MAN'S LAND" THAT THE SUPREME COURT HAS ALREADY STATED WAS "INTOLERABLE" AND HAS REACHED A DECISION ON IMPORTANT LEGAL ISSUES DIRECTLY CONTRARY TO DECISIONS IN OTHER CIRCUITS.

The case presented here by petitioner involves a claim for conscientious objector status first made after the issuance of an order to report for induction, the consideration given to that claim by the local draft board, and the effect of that consideration upon the constitutional rights of petitioner. Petitioner has contended throughout these proceedings that his local draft board, while purporting not to reopen his classification, made an evaluative

determination on the merits of the claim, as shown by its findings of insincerity, and that this action denied petitioner the procedural rights attendant to a classification decision and would have prevented him from receiving a hearing on that claim had he chosen to submit to induction. The opinion of the majority in the Ninth Circuit does not dispute the fact that petitioner's claim was actually decided upon its merits; rather, it holds that there can be no de facto reopening of the classification and that since the local board was powerless to act, anything done " . . . on the merits of Musser's conscientious objection had no validity, force, or effect" (United States v. Musser, ___ F.2d ____, [9th Cir., May 2, 1973] Appendix A at page 27.

The issues raised by petitioner in his appeal to the Ninth Circuit and in this petition have been considered by other trial courts and by other Courts of Appeals and the result has been directly conflicting holdings. Where the Ninth Circuit in Musser, supra, says:

> "Had Musser been inducted and had he made an in-service claim to conscientious objector status no presumption that the local board evaluated and denied that claim could have been made." (Appendix A at page 27)

the Third Circuit in United States v. Ziskowski, 465 F.2d 480 (3d Cir. 1972) on virtually identical facts, said:

> "Thus, even assuming that at the

"time that Ziskowski would have been inducted the Army would have construed the above quoted AR 630-20, ¶3b(2), to bar only those conscientious objector claims that had been denied by the Selective Service System on the merits (not a necessary assumption in view of the rather ambiguous language of the regulation),[12] the Army might reasonably have construed the board's action as precluding consideration of Ziskowski's conscientious objector claim in the Army.[13]" (485) (footnotes omitted)

Thus, while the Seventh Circuit[1] concurs with the Ninth Circuit, the First Circuit[2] and the Third Circuit[3] and trial courts in the Second Circuit[4], Sixth Circuit[5] and Eighth Circuit[6] have held

---

1. Wright v. Ingold, 445 F.2d 109 (7th Cir. 1971) and United States v. Waldron, ___ F.2d ___ (7th Cir. February 8, 1973); petition for cert. filed ____ U.S.L.W. ___ (U.S. May 14, 1972)(No. 72-6748)

2. United States v. Alioto, 469 F.2d 722 (1st Cir. 1972)

3. United States v. Shomock, 462 F.2d 338 (3rd Cir. 1972) and United States v. Ziskowski, 465 F.2d, 480 (3rd Cir. 1972)

4. United States v. Cotton, 346 F.Supp. 691 (S.D.N.Y. 1972) and United States v. Usdin, 6 SSLR 3039 (E.D.N.Y. December 21, 1972)

5. United States v. Takala, 5 SSLR 3773 (E.D.Mich. September 11, 1972)

6. United States v. England, 348 F.Supp. 851 (W.D.Mo. 1971)

that convictions cannot be sustained where the local board considered or, because the reasons for its refusal to reopen a classification were unelaborated, may have considered post-induction order claims for conscientious objector status on their merits.

The primary consequence of the action taken by petitioner's draft board in evaluating the merits of petitioner's post-induction notice claim was to place petitioner suarely within the "no man's land" which this court described as "intolerable" in Ehlert v. United States, 402 U.S. 99 (1971). In that decision, this Court held that a local board acted within its authority when it refused to give any consideration to a post-induction notice claim of conscientious objection. In that

decision, the Court held the door open for review of a case such as the case at bar where it states that its holding is based upon the assurances it received from the Army that conscientious objector claims crystallizing between the date of issuance of induction notice and the date of induction would be heard in the Army under the applicable Army regulations. The court said:

> "For if . . . a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facia conscientious objector claim under established criteria, . . . a wholly different case would be presented." (107)

This is that "wholly different

case" and the questions it raises are equally as worthy of resolution by this Court as were those raised in Ehlert v. U.S., supra. Where the Court in Ehlert was concerned with a situation arising under Army Regulation 635-20, 3.b.(1) effective August 15, 1970 (Appendix C at page 36), any claim to in-service relief made by Musser would have been governed by §3.b.(2)of that same Army regulation and by Department of Defense Directive No. 1300.6, §IV(B)(2) (See Appendix D at page 37). Army Regulation 635-20, 3.b.(2) in effect at the time of petitioner's refusal to submit to induction provides in part that in-service claims for conscientous objector status will not be favorably considered when:

"(2) Based solely on conscientious objection claimed

"and denied by the Selective Service System prior to induction."

As noted above, the Ninth Circuit treated the local board's decision, based upon their finding of insincerity, as being on the merits in arriving at its decision. In United States v. Shomock, supra, the court set forth in full a copy of a letter dated February 9, 1972 from the Office of the General Counsel, Department of the Army, to the prosecuting attorney, which stated:

"If the appellant had entered the Army in May 1969 under circumstances where the Selective Service System actually considered and denied his conscientious objector claim on the merits, he would not have been

"entitled to an in-service determination on the merits of his conscientious objector claim." (345)

In Baker v. Laird, 316 F.Supp. 1 (N.D. Cal. 1970) the court noted that AR 635-20, 3.b.(2) precluded a personnel separation for persons whose views were fixed prior to active service, who had made claims for conscientious objector status based upon those views and who had had those claims denied by their draft boards upon their merits. The potential for prejudice under AR 635-20, 3.b.(2) is at least as great as that arising under AR 635-20, 3.b.(1) as illustrated by the situation of petitioner who, sought only the guaranty of a full and complete hearing on his claim and who, was forced to refuse to submit

to induction because he and his attorney, like the First and Third Circuits later, viewed the draft board's action as constituting a Selective Service determination of that claim and the applicable Army regulations as precluding in-service relief. In a virtually idential situation in United States v. Usdin, supra, the court granted a motion to dismiss:

> " . . . because every registrant claiming conscientious objector status must somewhere, sometime have the opportunity to fully present his claim for determination under established criteria. Furthermore, he must be assured in advance that such an opportunity will be afforded him . . . . The defendantwas plac-

"ed in a 'catch 22' situation. His local board had deprived him of an opportunity to present his claim by acting illegally and it is likely that the military would have refused a post-induction hearing on the grounds the merits of the claim had already been decided by the local board. The Supreme Court has termed such a no man's land 'intolerable' . . ." (3041)

As in Usdin, supra, petitioner was placed in the position of having his draft board consider the merits of the claim without having the procedural rights attendant to such consideration, and yet, by virtue of that consideration, being precluded from raising that claim

after induction into the Army. Petitioner submits to this Court that a regulatory scheme that is as vague and uncertain as is the combination of Selective Service regulations and Army regulations here in question and which could work, in a case such as this, to deny a registrant his right to a forum where his lately crystallized conscientous objector claim could be fairly determined, constitutes a denial of due process.

Implicit in the decision of the Ninth Circuit in this case and explicit in the decision of the Seventh Circuit in United States v. Waldron, supra, is the idea that a registrant in the position of petitioner should have submitted to induction and, if denied in-service relief on the grounds that his local board had given him his full hearing,

avail himself of habeas corpus. This reasoning ignores Estep v. United States, 327 U.S. 114 (1946) which holds that a registrant may refuse induction and seek judicial review of the acts of his local draft board in criminal proceedings and need not submit to induction and then proceed under habeas corpus. This reasoning also ignores the very practical problem which a registrant would face by submitting to induction. Should a registrant submit to induction and bring habeas corpus proceedings when denied an in-service forum, he would be faced with the argument that his claim had been heard on the merits by his draft board and that if he felt that that hearing was procedurally inadequate, his remedy was to then refuse induction and test the propriety of his draft board's

conduct in criminal proceedings. It was this dilemma that petitioner had to confront at the time of his decision to refuse to submit to induction and it is submitted that when a draft board's actions, combined with the relevant Selective Service and Army regulations can place a registrant in the position of having to make such an election and, if he is wrong, being denied not only his right to have his claim for conscientious objection heard but also his right to have a judicial determination of the propriety of those actions which resulted in his inability to have a forum for his conscientious objector claim, the very heart of the registrant's constitutional rights have been violated.

The Court's attention is directed to United States v. Waldron, supra, in

which a petition for certiorari was filed with this Court on May 14, 1973 raising the propriety of the Seventh Circuit's holding in a situation very much like that in the case at bar. The issues raised by the Waldron petition and in the case at bar bear directly upon the resolution of a large number of cases now pending throughout the country. One indication of the large number of such cases is the fact that seven reported cases, previously cited in footnotes to this petition, have been handed down within the past year. The Justice Department has indicated that there will be no "amnesty" for draft cases now pending before the courts and, with the current backlog of Selective Service cases, the courts in virtually every circuit will be forced to choose either

the rule announced by the Seventh and Ninth Circuits or the rule adopted by the First and Third Circuits and by trial courts in the Second, Sixth and Eighth Circuits. In view of the importance of the questions presented and the number of cases in which these questions will be determinative, it is requested that this Court grant certiorari so that the outcome in the cases presenting these issues may be determined on some basis other than the chance of geography.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Ap-

peals for the Ninth Circuit.

Respectfully submitted,

Wallace L. Duncan
Duncan & Brown
1700 Pennsylvania Ave. N.W.
Washington, D. C. 20006

Of Counsel

FRANCIS A. WATSON, JR.
RONALD A. RUBENSTEIN

WATSON & HOFFE
3700 Barrett Avenue
Richmond, California 94805

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
CHRISTOPHER JOSEPH MUSSER,
Defendant-Appellant.
No. 72-1276

[May 2, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: HUFSTEDLER and CHOY, Circuit Judges, and SMITH,* District Judge.

PER CURIAM:

Defendant appeals his conviction of refusing to submit to induction (50 U.S.C. App. § 462(a)). An induction order issued September 15, 1970, ordered defendant to report on October 14, 1970. On September 21, 1970, defendant requested and received the special form for conscientious objectors which he returned to the local board on September 28, 1970. The board reviewed the claim, determined that it lacked sincerity, refused to reclassify defendant,[1] and advised defendant that he must report for induction.

It is now claimed that the board did in fact consider the claim on the merits and in fact reopened the classification, and that having done so the board could not label its action as a refusal to

*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

[1]The local board's minutes stated: "C.O. claim reviewed under section 625.2 SSR and classification not reopened." And the form letter notice to Musser said that his classification was not reopened because there had not been a change in status resulting from circumstances over which he had no control.

reopen and thus cut off defendant's rights to appear, be heard, and appeal. Defendant relies upon *Miller v. United States,* 388 F.2d 973 (9th Cir. 1967).

32 C.F.R. § 1625.2 provides that a classification "shall not be reopened" after the induction order is mailed unless the board "first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The language is mandatory. The board lacks power to reopen in the absence of the required finding. *United States v. Stupke,* 451 F.2d 997 (9th Cir. 1971); *United States v. Hand,* 443 F.2d 826 (9th Cir. 1971). A local draft board lacking power to formally reopen cannot accomplish a de facto reopening. *United States v. Nix,* 437 F.2d 746 (9th Cir. 1971). *Miller v. United States, supra,* is not contrary. In that case the State Director, acting within his authority, had ordered the local board to reconsider.

Had Musser been inducted and had he made an in-service claim to conscientious objector status no presumption that the local board evaluated and denied that claim could have been drawn. The board was powerless to reopen the classification. Anything the board recorded in its minutes or did on the merits of Musser's conscientious objection had no validity, force, or effect.

Affirmed.

HUFSTEDLER, Circuit Judge (dissenting):

I recognize that a conflict in the circuits now exists on this question and that authorities in some of the circuits support the majority's view.[1] This conflict has been engendered by differing interpretations of the Supreme Court's decision in *Ehlert v. United States* (1971) 402 U.S. 99. I read *Ehlert,* as do the First and Third Circuits, as requiring that every conscientious objector applicant has meaningful opportunity for at least one full and fair administrative determination of his conscientious objector claim and that the registrant cannot be relegated to a " 'no man's

[1] *See* United States v. Waldron (7th Cir. Feb. 8, 1973) ..... F.2d .....; *cf.* Swift v. Director of Selective Service (D.C. Cir. 1971) 448 F.2d 1147; Wright v. Ingold (7th Cir. 1971) 445 F.2d 109.

land'" where his claim will never be administratively reviewed.[2] *See United States v. Alioto* (1st Cir. 1972) 469 F.2d 722; *United States v. Ziskowski* (3rd Cir. 1972) 465 F.2d 480; *United States v. Shomock* (3rd Cir. 1972) 462 F.2d 338; *see also United States v. Usdin* (E.D.N.Y. Dec. 21, 1972) 6 SSLR 3039; *United States v. Cotton* (S.D.N.Y. 1972) 346 F. Supp. 691; *United States v. Takala* (E.D.Mich., Sept. 11, 1972) 5 SSLR 3773.

Judge Coffin's opinion in *Alioto* eloquently expresses my own views on the correct interpretation of *Ehlert*. That reading would compel a reversal of this conviction for the *Ehlert* "'no man's land'" script exactly fits Musser.[3] Under the pertinent Selective

---

[2]"That those whose views are late in crystallizing can be required to wait [to present their claims after induction], however, does not mean that they can be deprived of a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria that must guide the Selective Service System. See *Welsh v. United States*, 398 U.S. 333. . . . It would be wholly arbitrary to deny the late crystallizer a full opportunity to obtain a determination on the merits of his claim to exemption from combatant training and service just because his conscientious scruples took shape during a brief period in legal limbo.[7]

"[7]Since such a 'no man's land' would be intolerable our decision today simply involves settling in which forum late crystallizers must have an opportunity for a ruling on the merits. Whether they may have such an opportunity at all cannot be open to question. . . ." 402 U.S. at 103-04.

[3]Following a I-A classification by his local board on February 25, 1970, appellant was ordered on September 15, 1970, to report for induction into the armed forces on October 14, 1970. On September 21, 1970, he requested and received an SSS Form 150 for conscientious objectors. The board members reviewed his claim on September 29, 1970. A summary of that meeting by the board's executive secretary indicates that:

"The local board reviewed registrant's complete claim. It was their determination that the claim lacks sincerity. Registrant must report for induction."

The local board minutes for that date bear the following handwritten entry: "Complete claim reviewed. Claim lacks sincerity." In addition, a barely legible stamped entry states that the "c.o. claim reviewed under section 1625.2 SSR and classification not reopened." On the same day of its meeting, the local board notified appellant by form letter that it had not reopened his classification:

"This will acknowledge receipt of your communication relative to your selective service status. The information contained therein has

Service regulations and case law, the local board could not simultaneously make an evaluative determination that his claim lacked sincerity and not reopen his classification.[4] I am also convinced that the local board's contradictory and ambiguous characterizations of its actions could have foreclosed appellant from an in-service forum for his conscientious objector claim. *See United States v. Usdin, supra.* Finally, were I to search the record to find a basis-in-fact for the local board's finding of appellant's insincerity, I would be compelled to conclude that the board's determination is wholly insupportable.[5]

---

been considered by this board and you are hereby advised it did not specifically find there has been a change in status resulting from circumstances over which you had no control. In its opinion, the reopening or reclassification of your case is therefore not warranted."

[4]Under certain circumstances a local board's handling of a registrant's request for a reopening and reclassification can constitute a constructive or de facto reopening of his classification, despite the board's characterization of its action as a denial of the reopening request. *E.g.*, United States v. Foster (9th Cir. 1971) 439 F.2d 29; Miller v. United States (9th Cir. 1967) 388 F.2d 973. Since Musser presented a prima facie case for conscientious objector status (*see* note 5 *infra*), any determination whether he was actually a conscientious objector could be evaluatively decided only through the normal processes and provisions of the regulations for considering and ascertaining classifications. The board's own records clearly demonstrate that appellant's claim was thoroughly reviewed. Only after this complete investigation did the board conclude the claim lacked sincerity. If the board did reopen and reconsider Musser's request, he was denied the important procedural rights of a personal appearance and appeal conferred by 32 C.F.R. § 1625.13. Mulloy v. United States (1970) 398 U.S. 410, 417-18. The order to report for induction was accordingly invalid, and Musser's conviction for refusing to submit should be reversed.

[5]As the Supreme Court has most recently observed:

"In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. *Gillette v. United States*, 401 U.S. 437. He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. *United States v. Seeger*, 380 U.S. 163; *Welsh v. United States*, 398 U.S. 333. And he must show that this objection is sincere. *Witmer v. United States*, 348 U.S. 375." Clay v. United

States (1971) 403 U.S. 698, 700; *see also* United States v. McKinley (9th Cir. 1971) 447 F.2d 962.

In his representations to the board, appellant manifested those deeply held scruples against killing customarily associated with conscientious objection. He signed Statement B of Series I of Special Form for Conscientious Objector (SSS Form 150):

"I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from combatant and noncombatant training and service in the Armed Forces, but am prepared to perform civilian alternative service if called. Registrants granted this status are classified I-O."

Commenting on the source of religious training and belief that formed the basis of his claim, Musser indicated as follows:

"Parents & family strongly Roman Catholic. Catechism (Our Lady of Loretto Parish, Novato Ca.) until the age of 12 (weekly) Confirmed at 12 yrs. active member of C.Y.O. with close relationship with Parish Priests. Public school education (Novato) Close friend of family—Father Thomas Reilly; profound influence until College age. Member Newman Club, College of Marin. Influenced by the writings of Bertrand Russel [*sic*] of which I have read almost everything."

In his attached statement amplifying his views, Musser set out in great detail the underlying reasons for his convictions and the genesis of his beliefs:

"The nature of my belief in the sacredness of human life arises out of my religious training, and is a product of that training and the observations I have made concerning the relationship between people, and between people and their god.

"I believe in God in the Christian (Roman Catholic) sense—as an outward, affecting omnipresent being; and that Jesus Christ was the son of God, manifesting himself in human form for the purpose of communicating consciously with men on earth.

"However I also believe that God is within you ('The Kingdom of God is within you') and can only be truly understood by inward reflection on the knowledge that is attained in the world outside the body.

"It is this inward reflection that has brought me, spontaneously, to the realization that the spiritual life of the individual is primary; indeed it is the main purpose for living—and all else (on a purely religious level) in this life, is either meant to develop or retard the spiritual growth of men, depending on their capacity to recognize the truth and act upon it. ('For what does a man have if he should gain the whole world, but lose his own soul?')

"It is also this reflection (or belief), which I realize now would not allow me to participate in *any* war for the reason that I might

be compelled, either by outside authority or animal instinct, to take the life of a person who by virtue of his wisdom could enrich my spiritual life considerably.

"These beliefs stem directly from my religious training. Questions 1 & 2, standard Catholic Catechism:

1. Who made us? Ans. God made us
2. Why did God make us? Ans. God made us to know, love and serve him that one day we might enter the kingdom of Heaven.

"In the end it is Jesus Christ who [*sic*] I believe we must look to, as Christians and as human beings, for an example to follow. Being a good Christian means being *as much in his image* as possible. Though it would be academic to argue whether Jesus would have let himself be drafted or not, the fact is that he never was. The fact is that when he was nailed to the cross, with all the power of the universe at his command, he only said 'Forgive them Lord, for they know not what they do.'.

"These beliefs may appear to be the result of a process of thinking that could not have developed in the short time since I have received my notice of Induction. Actually, I never could have written this down for the purpose for which it is intended without receiving my notice. At that time the thoughts that had been brewing in my subconscious for so long were suddenly confronted with the reality that exists—that I could be called upon to kill another man for the beliefs that other people hold. I realize now that this is something I could not do."

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 5-9-73—480

APPENDIX B

32 C.F.R. §1625.2

WHEN REGISTRANT'S CLASSIFICATION MAY BE REOPENED AND CONSIDERED ANEW.

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

32 C.F.R. §1625.4

REFUSAL TO REOPEN AND CONSIDER

ANEW REGISTRANT'S CLASSIFICATION.

When a registrant files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board (a) shall record in the registrant's file the reasons for its decision not to reopen his classification, and (b) shall advise the registrant by letter of its decision not to reopen his classification and the reasons therefor.

32 C.F.R. §1625.11

CLASSIFICATION CONSIDERED ANEW WHEN REOPENED.

When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he

was in before his classification was reopened.

32 C.F.R. §1625.12

NOTICE OF ACTION WHEN CLASSIFICATION CONSIDERED ANEW.

When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail him notice thereof.

32 C.F.R. §1625.13

RIGHT OF APPEAL FOLLOWING REOPENING OF CLASSIFICATION.

Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

32 C.F.R. §1625.14

CANCELLATION OF ORDER TO REPORT FOR INDUCTION OR FOR ALTERNATE SERVICE BY REOPENING OF CLASSIFICATION.

The reopening of the classification of a registrant by the local board shall cancel any order to report for induction or alternate service which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for

the purpose of placing him in Class 4-C shall not cancel the order with which he failed to comply.

APPENDIX C

Army Regulation 635-20, August 20, 1970

3.b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered. Requests for discharge after entering military service will not be favorably considered when-

(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

(3) Based solely upon considerations of policy, pragmation or expediency.

(4) Based on objection to a particular war.

APPENDIX D

Department of Defense Directive No. 1300.6, May 10, 1968

B. DOD Policy. Consistent with this national policy, bona fide conscientous objection as set forth in this Directive by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized. This policy will be executed subject to the following:

. . .

2. A request for discharge after entering military service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1733

CHRISTOPHER JOSEPH MUSSER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-6748

ROBERT HAINES WALDRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SEVENTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES

Each petitioner alleges that he has been denied a full hearing on his claim that he is entitled to Selective Service classification as a conscientious objector.

Petitioner in No. 72-1733 was convicted after a jury-waived trial for refusal to submit to induction in violation of 50 U.S.C. App. 462(a); he received a 2 year sentence. Petitioner in No. 72-6748 was similarly convicted after trial without a jury, and sentenced to three years' probation on condition he perform work contributing to the national health, safety, or interest. Both courts of appeals affirmed.

In both cases, petitioners first claimed conscientious objector status after notices of induction were mailed to them; each asserted to his local board that his views did not become fixed until after receipt of his notice. Both boards granted courtesy interviews, but declined to reopen. Petitioner in No. 72-6748 was informed that he had presented no facts warranting a reopening and change of his classification. In No. 72-1733, the reason for denying reopening was stated to be that the "[c]laim lacks sincerity" (Pet. App. A3, n. 3). Both petitioners appeared for induction but refused to submit; their indictments and convictions followed.

In *Ehlert* v. *United States,* 402 U.S. 99, this Court held that Selective Service regulations properly require "late crystallizing" registrants such as petitioners to submit to induction and present their claims to the military (402 U.S. at 103).[1] The Court carefully noted that a late crystallizer cannot be left with no forum in which the merits of his claim will receive a full and fair adjudication (*id.* at 103-104); it accepted, however, the assurances of the Department of Defense that, despite some contradictory language in the applicable military regulations, a claim of post-notice crystallization is treated by the armed forces

---

[1]The board actions which petitioners challenge were taken before *Ehlert* was decided.

as the equivalent of a claim of post-induction crystallization (*id.* at 106-107 and n. 11), and thus that "there * * * exists no possibility that late crystallizers will find themselves without a forum in which to press their claims" (*id.* at 107). This Court concluded not only that the Controlling Selective Service regulation (32 C.F.R. 1625.2) "barred presentation to the local board" of a late crystallization claim, but also that such claims must be given a full hearing by the Army after induction (*id.* at 107-108). *Ehlert* thus teaches that petitioners were entitled to a full hearing after induction and that the local boards acting under 32 C.F.R. 1625.2 were powerless to give them such a hearing before induction.

Petitioners, however, point to Army Regulation 635-20, Para. 3b(2), not mentioned in *Ehlert,* which denied in-service consideration to claims of conscientious objection if they were "claimed and denied by the Selective Service System prior to induction." Petitioners contend that if they had submitted to induction, the Army would have considered the boards' actions to be a denial of their claims, rather than a refusal to hear them,[2] and they would then have been denied a full hearing on the merits of their claim in any forum.[3]

---

[2]Both board actions were ambiguous: In No. 72-1733, the stated reason for the refusal to reopen was petitioner's lack of sincerity; in No. 72-6748, the reopening was not specifically denied as untimely, and there was, at trial, some evidence that the board considered the merits of the claim.

[3]A full hearing would include the rights to a personal appearance and to appeal an adverse decision, both of which are provided when the board reopens the file but not when it refuses to reopen. Compare 32 C.F.R. 1625.4 with 32 C.F.R. 1625.13.

Both courts below rejected this contention on the grounds that the boards had no power to reopen the classification and consider the claims on the merits, and that therefore, even assuming that they had attempted to do so, such attempts were a nullity (Pet. in No. 72-1733 at App. 27; Pet. in No. 72-6748 at App. 93-94). The courts concluded that the boards' actions could not have barred Army review of petitioners' claims, and there was thus no denial of a forum. Therefore, neither petitioner was justified in refusing induction.

The courts below, we submit, reached the correct result. *Ehlert* indicates that late crystallizing conscientious objectors are entitled to a full hearing on the merits of their claim and approves the administrative interpretation of the Selective Service and Army regulations which ordinarily requires that review to take place after induction.[4] Petitioners here have prevented completion of the procedures approved in *Ehlert* by refusing induction; thus there has been no opportunity for them to have the full hearing there contemplated.

---

[4]Under some circumstances, the boards apparently could reopen a late crystallizer's classification and consider his claim on the merits, affording him his right to appear personally and to appeal an adverse decision. In such circumstances, the Army could, consistently with *Ehlert*, deny a further in-service review. The crucial question is not whether there has been any board consideration of the merits, but rather whether the registrant has had "a full opportunity" to present his claims (*Ehlert, supra*, 402 U.S. at 104, 107).

Petitioner in No. 72-6748 asserts that his case was processed under a procedure which permitted the board to reopen and consider his claim, since, he alleges, the State Director of Selective Service authorized a re-opening. The court below correctly concluded that the evidence did not show that the State Director intended to give such an authorization, and even if he had, his authority to do so was not clear. In any event, the board explicitly refused to reopen and a full hearing was not provided.

Their asserted belief that an in-service forum would not be available is not well-founded.[5] If in fact the Army denied them a full hearing, it is clear that habeas corpus would be available. The argument petitioners make now, that they have been placed in the no man's land forbidden by *Ehlert*, would only at that time be a correct ground on which to grant relief.[6]

Petitioners assert that the decisions below are inconsistent with *Estep* v. *United States*, 327 U.S. 114, since they refused to accept petitioners' defense. But *Estep* held that a registrant could assert as a defense to a criminal prosecution for disobeying the board's order the claim that the board had acted without jurisdiction. Here, petitioners were permitted to assert their defense in the criminal action. *Estep* does not mean that all defenses which are heard must be accepted. In any event, the board order petitioners were required to obey was the original order to report for induction, which is not the board action of which petitioners complain. *Estep* does not require a pre-induction review of a board refusal to reconsider a valid order.

As petitioners point out, denial of reopening by local boards in circumstances substantially similar to those

---

[5]In *Ehlert*, the Army based its assurance that late-crystallizing conscientious objectors would have an in-service forum in which to press their claims on A.R. 635-20 3(b)(1). There is no reason to assume that the Army was so disingenuous as to give such an assurance if Para. 3(b)(2) of that same regulation were interpreted to bar consideration of some such claims.

[6]Petitioner in No. 72-6748 assumes that the success of a habeas petition in this situation would depend on his bringing suit in a Circuit which follows the reasoning of the cases below (Pet. 14). But even the cases cited *infra* at 6, which reject this reasoning, agree that *Ehlert* would require a full hearing in the circumstances postulated, and thus any court could be expected to grant a habeas petition.

presented by these two cases have been held by the First and Third Circuits to preclude conviction for refusal to submit to induction. *United States* v. *Alioto*, 469 F. 2d 722 (C.A. 1); *United States* v. *Shomock*, 462 F. 2d 338 (C.A. 3); *United States* v. *Ziskowski*, 465 F. 2d 480 (C.A. 3); *United States* v. *Jerrold*, C.A. 1, No. 72-1320, decided June 29, 1973; *United States* v. *Folino*, C.A. 3, No. 72-1974, decided June 29, 1973.[7] For the reasons indicated above, we believe these cases were wrongly decided.

We recognize, however, that the conflicting views of the courts result in unequal treatment for persons similarly situated.[8] We therefore acquiesce in the granting of these petitions for certiorari so that the conflict may be resolved. But it does not necessarily follow that plenary consideration with oral argument is warranted. The question is not complex and, in light of the end of the draft, its resolution will not establish a lasting precedent. In this unusual situation, we suggest that summary disposition would not be

---

[7]District courts in the Southern and Eastern Districts of New York have reached the same result, relying on the Third Circuit cases. *United States* v. *Cotton*, 346 F. Supp. 691 (S.D. N.Y.); *United States* v. *Usdin*, No. 72-CR-734, 6 S.S.L.R. 3039 (E.D.N.Y.).

Shomack has been cited with approval in a case not involving late crystallization in *United States* v. *Takala*, No. 47047, 5 S.S.L.R. 3773 (E.D. Mich.).

[8] Although we estimate that there are 5,900 prosecutions presently pending under the Act (approximately 4,600 of which involve fugitive defendants) and another 4,600 cases being processed for possible prosecution, we cannot say with any accuracy how many individuals may eventually be affected by this disagreement among the circuits. We do not, however, agree with counsel in No. 72-6748 that the majoriy of pending cases will be affected (Pet. 21). Moreover, we do not expect the issue to arise in many cases which involve post-*Ehlert* board actions.

inappropriate. For our part, we are content to rest on the opinions below, supplemented by the present memorandum. Petitioners may, of course, file reply briefs if they choose.

It is respectfully submitted that the petitions for writs of certiorari should be granted and the decisions of the courts of appeals summarily affirmed.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

FILE COPY

Supreme Court, U. S.
FILED
SEP 28 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1733

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

Wallace L. Duncan, Esq.
Counsel for Petitioner
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Of Counsel

Watson & Hoffe

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

The government in its memorandum filed in response to the petitions for certiorari in this case and in No. 72-6748 concedes the "certworthiness" of the issues raised in these

petitions and joins petitioner in urging that this Court resolve the conflict presently existing between the circuits (Memorandum at p. 6). The government goes further however, and, suggesting that the issues are not complex and that their disposition will not create lasting precedent, requests summary disposition of these cases (Memorandum at pp. 6-7). For a number of very substantial reasons, petitioner strongly objects to this somewhat novel suggestion and urges the Court to grant certiorari, require the parties to fully brief the case and to hear oral argument before reaching a decision on the merits.

While the question presented to the Court may be stated in rather simple terms, the legal and factual arguments that will determine its resolution are most complex. Certainly the issues raised by this petition are as complex as those raised in Ehlert v. United States, 402 U.S. 99. As to the precedent-setting value of the case, the government's memorandum estimates that there are approximately 5900 prosecutions now pending and 4600 cases under review for possible prosecution (Memorandum at p. 6, n. 8). Based upon the figures referred to above, the estimates of experts in the field (Petition of Writ for Certiorari, No. 72-6748

at pp. 20-21), and the number of recent decisions involving these issues (Petition for a Writ of Certiorari, No. 72-1733, p. 12 and Memorandum for the United States p.6), there can be no doubt but that a decision in this case will have a crucial effect upon the lives of a large number of individuals. Furthermore, it is quite possible that the future may see the return of the draft and the resurrection of much of the regulatory and statutory scheme involved in this litigation.

The government's suggestion that the Court grant certiorari and then make a summary disposition of the case places an unfair

and prejudicial burden on defendant. Despite our Petition for Certiorari and the government's acquiesence to our request for a Supreme Court ruling, petitioner is still without any assurance that certiorari will be granted. Petitioner has not fully presented the merits of his case to the Court and desires to do so before the Court renders any decision. Yet prior to the issuance of certiorari, the preparation of a brief on the merits may prove to be only a very expensive exercise in futility. For this reason, petitioner will not undertake to have a brief prepared and filed until we have been advised that

the Court will consider the merits of the case. If the government feels that the merits of its case are before the Court and that the question is not complex, it may waive its rights to brief and to argue the case but petitioner would not share these views and, if the Court were to grant certiorari, would want to fully brief and argue the case.

Counsel for petitioner has been advised that there are third parties who are interested in the issues raised in our Petition and who would like the opportunity to file amicus curiae briefs. Should the Court make a summary disposition of this case, the parties and the Court

would lose benefit of the evidence and arguments that these third parties would present.

In view of the government's concurrence with our position as to the need for the Court to rule on the issues raised by our Petition, we renew our request that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Wallace L. Duncan
Duncan & Brown
1700 Pennsylvania Ave N.W.
Washington, D.C. 20006

Of Counsel

FRANCIS A. WATSON, JR.
RONALD A. RUBENSTEIN

WATSON & HOFFE
3700 Barrett Avenue
Richmond, California 94805

FILE COPY

Supreme Court, U. S.
FILED
DEC 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1733

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

Wallace L. Duncan, Esq.
Counsel for Petitioner
1700 Pennsylvania Avenue,
N.W.
Washington, D.C. 20006

Of Counsel

Watson & Hoffe

SUBJECT INDEX

Cases Cited----------i

Regulations Cited----------ii

Argument----------1

Certificate of Good Faith--------29

CASES CITED

Applegate v. Stillwell,
C-73 1120 ACW (N.D. Cal.
July 26, 1973)----------22

Ehlert v. United States,
402 U.S. 99 (1971)-------3,4,5,7,8,11,
13,14,19,21,22,
23,25,26,27

Morrison v. Larsen,
70 858 ACW (N.D. Cal. 1970)
rev'd and remanded, 4 SSLR
3335, 446 F.2d 250 (9th Cir.
1970), order on remand, No.
70 858 ACW (N.D. Cal. 1972)-15

Ryan v. Hershey,
3 SSLR 3929, 308 (E.D. Mo.
1969) aff'd. 4 SSLR 3197.
445 F.2d 560 (8th Cir.
1971). cert.denied. 404
U.S. 1004 (1971)---------20

United States v. Shomock,
462 F.2d 339 (3rd Cir.
1972)--------------------8,24

REGULATIONS CITED

Army Regulation 635-20
August 15, 1970---------2,11,17,20,23,
24,26

Department of Defense
Directive No. 1300.6,
May 10, 1968------------11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1733

CHRISTOPHER JOSEPH MUSSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

The decision of this court, reached without the benefit of briefs on the merits or oral argument, holding that draft boards are without power to re-open or rule upon the merits of post-in-

duction notice claims of conscientious objection and that the Army under Army Regulation 635-20, 3.b.(2) can neither refuse to give a full and fair hearing to such a claim or reject it on the grounds that the Selective Service System has considered the merits of the claim is welcomed because it clarifies an area of the law that has long been a source of confusion and uncertainty for registrants, legal advisers, the Selective Service System and draft experts. The decision is now a source of certain notice to all that post-induction notice claims of conscientious objection are not to be and cannot be considered by local draft boards and that any consideration given to such a claim by a local draft board is, for all purposes,

to be ignored. The decision is also a warning to the Army that a distinction must now be drawn between those conscientious objector claims maturing prior to issuance of an induction notice and those maturing after the issuance of an induction notice and that, insofar as the post-induction notice claims are concerned, the Army must give full consideration under established criteria to all such claims.

However, petitioner respectfully requests that this court reconsider its Per Curiam decision, at least insofar as it pertains to registrants who refused induction prior to the rendition of Ehlert v. United States, 402 U.S. 99 (1971) on April 21, 1971, for in adjudicating this case solely on the basis of petitions for certiorari and a responding memoran-

dum, the court has had to assume the existence of an Army practice which has never been forced to withstand the vigors of the judicial fact finding process and which newly compiled and painstakingly researched evidence conclusively shows did not exist. The court's Per Curiam opinion was based on Ehlert, supra, which, in turn, relied primarily upon a letter prepared especially for the court's use and only submitted following oral argument in that case. That letter, from then General Counsel of the Army Jordan to then Assistant Attorney General Rehnquist, stated:

> "You asked whether the Army allows a soldier to file for discharge in instances where his conscientious objector views are fixed after notice of induction

"but prior to entry into the military service. Present practice grants the soldier the opportunity to file in such cases."[1]

As the court said in Ehlert:

"We are assured . . . that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims . . . for if, contrary to that assurance, a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria . . .

---

1 Letter reprinted in relevant part in Ehlert, supra, 107, Note 11.

"a wholly different case would be presented." (107)

Despite the court's own language that there must be "no possibility" of registrants finding themselves without a forum, to the best knowledge of counsel, there has never been any judicial proceeding where competent evidence was presented by parties on both sides of the issue and where a judicial determination had been made as to the existence of such a practice. By ruling without the benefit of full briefs and oral argument, the court has precluded petitioner from presenting and itself from considering documented and detailed evidence that not only was there a "possibility" that late crystallizers would be without a forum but that Army practice was directly contrary to the assurance upon which

Ehlert was predicated. At all times prior to Ehlert, the Army has failed to distinguish between those whose conscientious objector claims crystallized after issuance of an induction notice and those whose claims crystallized prior to the issuance of such a notice and the Army practice has been to reject all claims to conscientious objector status maturing prior to entry into active service.

Counsel is aware of three official responses from the Army as to its practice in regard to the treatment of in-service conscientious objector claims which allegedly matured prior to entry into active service but subsequent to the issuance of the order to report for

induction.[2]

In view of the court's language in Ehlert re "no possibility" of a forumless registrant, the equivocating language used by General Counsel Berry in the letter submitted to the court in United States v. Shomock, 462 F.2d 339 (3rd Cir. 1972) saying:

> "If it is assumed that Army policy would have been followed in appellant's case . . . ." (345, Fn.17)

is most surprising; however, it is not as surprising as the fact that not one of

---

2 In addition to the letter quoted in Ehlert, a similar letter was submitted to the court in United States v. Shomock, supra, and quoted in full in Fn. 17 therein. In addition, a letter was sent to Senator Gaylord Nelson on February 16, 1972 by Major General Bernard W. Rogers, Chief of the Department of the Army, Legislative Liaison.

those three responses makes reference to any actual case where what was originally referred to as "Army practice" and later referred to as "Army policy" was actually followed. Because the dispute as to the existence of such a "policy" or "practice" could most easily be put to rest by reference to actual cases where registrants had been treated in accordance with the alleged "policy" or "practice" this omission raises a strong suspicion that while perhaps such a "policy" may exist in the eyes of the Army's legal counsel, no actual "practice" exists whereby registrants are given treatment in accordance with this policy. While the existence of such strong suspicions may not, in the eyes of this court, be sufficient reason to give its valuable time to a review of detailed briefs on the merits

or the consideration of oral argument, the fact that documented evidence shows that there was no such practice and that there are no such actual cases is sufficient reason for plenary consideration by this court.

Petitioner cannot, in this request for a rehearing, present to the court all of the evidence contradicting the Army's assurance of a forum as the detailed and fully documented exposition which this issue requires can only be brought to the court's attention through a brief on the merits. This is particularly true in this situation as some cases are not reported and others must be supplemented by material not appearing in reported decisions. A bare outline of the evidence that has been marshalled must suffice.

Apart from Army Regulation 635-20 and Department of Defense Directive 1300.6, the only information available to Army personnel prior to this court's decision in Ehlert, was a manual elaborating upon the regulatory provisions prepared for the use of Army chaplains counseling conscientous objector claimants. This material did not and still does not contain any mention of the "policy" referred to in the letter submitted in Ehlert. Furthermore, all references therein to the time of crystallization required for favorable treatment for in-service claims state that such claims must mature after the date of induction and there is no reference to the fact that those claims maturing subsequent to the issuance of an order to report for induction are to be treat-

ed differently from those maturing prior to the issuance of an induction notice.

In addition, inquiry was made of several attorneys now in private practice who were formerly in the Judge Advocate General Corps and served on the Army's Conscientious Objector Review Board. One individual responded in part:

> "I do not recall observing a policy on the part of the hearing officers to employ a practice of granting CO status to persons whose views crystallized prior to induction."[3]

A second responded that while he could not be certain that the interpretation placed upon the regulations in the let-

---

3 Letter to Bella A. Silard dated May 25, 1973 from Forest T. Walpole.

ter submitted to the court in Ehlert had never been communicated to members of the Board, he did state that:

> "So far as I can recall, however, I have never seen any such interpretation." [4]

A third response stated:

> "I do not recall ever having been made aware of the practice outlined by Mr. Jordan during the time I served on the Conscientious Objector Review Board. . . .
>
> "At this particular time, reflecting back to late 1970 and early 1971, I don't believe we followed a practice of allowing conscientious objector status to anyone whose conscientious objective

4 Letter to Bella A. Silard dated March 26, 1973 from Daniel H. Skerrit.

"views crystallized prior to his actual entry on active duty."[5]

Thus, three lawyers, all former members of the Army body charged with the implementation of the applicable rules and regulations have stated that they cannot recall being made aware of the practice which General Counsel Jordan assured the court did exist and two of the three members do not believe that individuals whose conscientious objector claims crystallized prior to entry into active service were granted conscientious objector status.

The actual practice of the Army, at least prior to Ehlert and for some time thereafter, was to treat all conscien-

---

5 Letter to Bella A. Silard dated May 3, 1973 to Sheldon G. Gilman.

tious objector claims, whether maturing before or after the issuance of a notice to report for induction, the same and to deny all such claims on the ground that they arose prior to entry into active service. While this standard finding tends to obscure the issue because it makes no distinction as to whether a claim matured before or after the issuance of an order to report for induction, the cases of Guy James Morrison, Earl F. Haase and John Michael Ryan show that included within this group of cases are cases where the Army has denied a forum to individuals whose claims have matured subsequent to the issuance of an order to report for induction.

In Morrison v. Larsen, 70 858 ACW (N.D. Cal. 1970) rev'd and remanded, 4 SSLR 3335, 446 F.2d 250 (9th Cir.

1970), order on remand, No. 70 858 ACW (N.D. Cal. 1972), the record discloses that while the registrant filed a statement of his "political and moral attitudes" prior to the issuance of an induction notice, the board did not treat this as a claim for conscientious objector status and did not evaluate the claim. Subsequent to the issuance of an induction notice the registrant completed a Form 150 which the local board considered and denied on the ground that he "stated that his feelings toward war had not changed." After induction into the Army, Morrison's claim for conscientious objector status was denied and habeas proceedings followed. Although the Ninth Circuit subsequently determined that Morrison's case was a "late filing" as opposed to a "late crystallizing"

situation, the important point is that the Army, in denying relief under Army Regulation 635-20, did not deny relief on the ground ultimately cited by the Ninth Circuit; rather, the Army's decision was based upon the fact that a claim had been presented to and denied by the Selective Service System. Since the record clearly shows that the only time a claim had been presented to and denied by the local board was subsequent to the issuance of a notice to report for induction, this is a blatant case of the Army denying a forum because of actions taken by a draft board in considering a registrant's claim on the merits subsequent to the issuance of an order to report for induction. These facts then were identical to those of the situation facing petitioner Musser at the time of

his refusal to submit to induction.

In the case of Haase, an application for conscientious objector status claiming crystallization after receipt of the induction notice was filed with the registrant's draft board subsequent to the issuance of a notice to report for induction. On his application for in-service relief, the hearing officer specifically found that the application was not based upon conscientious objection which existed but was not claimed prior to notice of induction and recommended that the claim be granted. However, the Conscientious Objector Review Board simply ignored the fact that this was a claim crystallizing subsequent to the issuance of an induction notice and denied the claim on the ground that the registrant's beliefs "existed prior to

his entrance on active duty." While this finding is not inaccurate because the claim did crystallize prior to entry into active service, it demonstrates a case where the Army placed a registrant in the "no man's land" referred to in Ehlert as registrant Haase was denied any forum wherein his claim could receive proper evaluation.

The case of registrant Ryan is even more flagrant as it suggests knowledge on the part of higher Army officials of the fact that the Army was, in practice, completely denying a forum to post-induction notice conscientious objector claimants. Ryan filed a conscientous objector claim with his local draft board claiming crystallization subsequent to the issuance of that notice. The claim was not considered by the local board and Ryan

submitted to induction only after a pre-induction suit in which the Court of Appeals for the Eighth Circuit ruled that Ryan would have the opportunity to present his claim to the Army subsequent to his induction notice.[6] Subsequent to induction, Ryan filed his claim for conscientious objector status to which was attached a statement from his attorney quoting both Army Regulation 635-20 and the opinion rendered by the Eighth Circuit. In spite of this clear warning, the Conscientious Objector Review Board denied the application on the sole ground that the registrant's beliefs "are based upon conscientious objection which existed prior to entry into the military service." One day later, Ryan

6 Ryan v. Hershey, 3 SSLR 3929. 308 (E.D. Mo. 1969) aff'd. 4 SSLR 3197. 445 F.2d 560 (8th Cir. 1971). cert.denied. 404 U.S. 1004 (1971)

made application for a writ of habeas corpus. The matter never proceeded further, however, as four days after that Ryan received a telegram from the Secretary of the Army granting him an honorable discharge. While no reason was given for the honorable discharge, the only reasonable conclusion which might be drawn was that high Army officials, aware of Ehlert, sought to avoid the embarrassment and publicity which a decision on the merits by the trial court would cause. This then is another case where Army personnel showed a lack of awareness of its own regulations and the Ehlert case and denied a forum to a post-induction notice conscientious objector claim by making its standard, vague finding of crystallization prior to entry into the military service.

As further evidence of the Army's lack of awareness, petitioner would point, in addition to the cases referred to above, to the many cases where in-service relief was denied with the standard finding that the claim crystallized prior to induction. If the Army were truly aware of the distinction that its own regulations and Ehlert require be drawn between pre-induction notice and post-induction notice conscientious objector claims, they would have instructed members of the Conscientious Objector Review Board that such findings are inadequate to sustain classification decisions when those decisions are attacked in subsequent habeas corpus proceedings. See Applegate v. Stillwell, C-73 1120 ACW (N.D. Cal. July 26, 1973). Such findings are inadequate for the pur-

pose of sustaining such decisions because they would be equally applicable to a post-induction notice crystallization case where denial upon that ground would, under Army Regulation 635-20 and Ehlert, be improper and to pre-notice crystallization cases where denial would be proper.

As an additional ground for this request for a rehearing, petitioner submits that this ruling should not be given retroactive application, at least insofar as it concerns those who were convicted for refusing induction prior to the rendering of the Ehlert decision. It was only with the rendering of that decision, some three months after petitioner's refusal to submit to induction, that the public was put on notice of what the Army claimed to be its policy. Prior to that time, a registrant whose

draft board had expressly ruled on the merits would, in considering how the Army might evaluate an in-service claim, have to contend with Army Regulation 635-20, 3.b.(2) which stated that such claims would not be favorably considered when "based solely on conscientious objection claimed and denied by the Selective Service System prior to induction." (emphasis added) As late as 1972, the Army in the letter submitted to the court in United States v. Shomock, supra, setting forth its policy with regard to post-induction notice claimants, stated:

> "If the appellant had entered the Army in May 1969 under circumstances where the Selective Service System actually considered and denied his conscientious objector claim on the merits, he

"would not have been entitled to an in-service determination on the merits of his conscientious objector claim." (345, Fn. 17)

It was only with the rendition of Ehlert, that anyone could reasonably believe that a denial on the merits under circumstances such as those in the case of petitioner would not preclude in-service relief because a local board was acting beyond its authority in considering the merits of such a claim. That persons could not reasonably have been expected to anticipate such a result prior to Ehlert is recognized by this court in its Per Curiam opinion where it states:

"While the critical word 'denied' might arguably be applied to a board's refusal to reopen a classification, it cannot

"be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that Ehlert has made clear that such a refusal can only be based on the board's lack of power to reopen in such a posture." (Per Curiam Opinion, page 8) (emphasis added)

It is submitted that prior to Ehlert, the Army regulations and practice were so unclear as to fail to give registrants notice of the fact that post-induction notice claims to conscientious objector status would be given full and fair consideration on the merits when raised in the Army after induction. To uphold convictions of those, such as petitioner, who read Army Regulation 635-20, 3.b.(2)

as denying them the right to in-service relief is to impose a most cruel penalty upon those who, without the benefit of relevant case law, made an interpretation identical to that made two years later by the First and Third Circuits.

This petition has demonstrated that there is significant and substantial evidence which compels the conclusion that the Army's assurances that there was a forum available to post-induction notice claimants for conscientious objector status was false and that courts have been misled by this assurance. In addition, the gross unfairness to those who, prior to Ehlert, reasonably interpreted the regulations as denying them any forum in which they could raise their claims to conscientious objector status has been demonstrated. For these rea-

sons, we respectfully request that this court grant this petition for a rehearing and set this matter for briefing and oral argument.

Respectfully submitted,

Wallace L. Duncan
Duncan & Brown
1700 Pennsylvania Ave.N.W.
Washington D.C. 20006

Of Counsel

FRANCIS A. WATSON, JR.
RONALD A. RUBENSTEIN

WATSON & HOFFE
3700 Barrett Avenue
Richmond, California 94805

CERTIFICATE OF GOOD FAITH

We, the undersigned, being counsel in this matter, do hereby certify that this Petition for Rehearing is presented and filed in good faith and not for the purpose of delay.

S/Wallace L. Duncan
Wallace L. Duncan

S/Ronald A. Rubenstein
Ronald A. Rubenstein

MUSSER v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1733. Decided November 12, 1973.*

A local draft board's mere refusal to reopen a registrant's classification following a claim for conscientious objector status made after issuance of an order to report for induction and based on an assertion that the registrant's conscientious objection to war in any form had crystallized after the issuance of the order to report, cannot signify more than a recognition of lack of power to reopen, and cannot be read as a "denial" of the claim on the merits and thus a bar to in-service review, no matter what the board's apparent motivations in refusing to reopen may have been, and notwithstanding an expressed or unexpressed indication of the board's view of the claim. *Ehlert* v. *United States*, 402 U. S. 99. Certiorari granted; No. 72–1733, 478 F. 2d 1068; and No. 72–6748, 474 F. 2d 90, affirmed.

PER CURIAM.

The petitioners in these cases were each convicted for refusing to submit to induction into the Armed Forces, 50 U. S. C. App. § 462 (a), and each seeks review of the judgment affirming his conviction upon the sole ground that the order to report for induction was invalid for failure of the local board to reopen his classification pursuant to a request for a conscientious objector classification, see *Mulloy* v. *United States*, 398 U. S. 410, 418 (1970).

In No. 72–1733, the petitioner Musser received an order to report for induction issued by his local board on September 15, 1970. On September 21, 1970, he re-

*Together with No. 72–6748, *Waldron* v. *United States*, on petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

quested and received Selective Service System Form 150, a special form for those seeking conscientious objector classification. Musser filled out the form, indicating in response to the questions posed that he was conscientiously opposed to participation in war in any form by reason of his religious training and belief, and claiming exemption from combatant and noncombatant training and service pursuant to 50 U. S. C. App. § 456 (j). On September 29, 1970, the local board reviewed Musser's application. The minutes of that meeting indicate that in the opinion of the members of the board, his claim "lack[ed] sincerity" and that he "must report for induction." On the same day he was sent a form letter stating that his application had been received and reviewed, that he was "hereby advised [that the board] did not specifically find there has been a change in status resulting from circumstances over which you had no control," and that pursuant to Selective Service Regulation 1625.2, 32 CFR § 1625.2,[1] his classification would therefore not be reopened.[2]

[1] At the time the administrative decisions involved in these cases were made, Regulation 1625.2 read in pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

[2] As used in the Selective Service Regulations and in this opinion, the term "reopen" signifies a fresh determination by the local board of the classification to which a registrant belongs. See Regulation 1625.11, 32 CFR § 1625.11. When a case is reopened by a local board, the registrant is automatically accorded the right to a per-

Musser was subsequently advised by the board of his continuing duty to report and was in fact ordered to report for induction on January 19, 1971. On that date he appeared at the induction center but refused to submit to induction. For this refusal he was convicted in a jury-waived trial and sentenced to two years' imprisonment. The Court of Appeals affirmed, 478 F. 2d 1068 (1973).

In No. 72–6748, the petitioner Waldron was, on December 30, 1968, mailed an order to report for induction on February 5, 1969. Shortly thereafter, he requested, received, and completed an SSS Form 150, indicating his opposition to war in any form and requesting a conscientious objector classification. On January 24, 1969, the board notified him that it had reviewed his application but "found no grounds for reopening your classification." Subsequently, on January 28, 1969, the State Director of Selective Service reviewed Waldron's file and recommended to the local board that his induction be postponed pursuant to Regulation 1632.2, 32 CFR § 1632.2, and that he be given a "courtesy interview" pursuant to then-current Local Board Memorandum 41. Waldron was thereupon sent a letter indicating that his induction was being postponed until February 19, 1969, and that he would be granted an interview on February 5, 1969. On February 6, following the interview, he was notified that the board found "no grounds for reopening your classification after you[r] being interviewed" and that he had to report for induction on February 19. He arranged further to postpone the date of his induction

---

sonal appearance before the local board and an administrative appeal of any adverse decision by the board, Regulation 1625.13, 32 CFR § 1625.13, even though a registrant is "reclassified" in the same classification as that in which he had formerly been put. *Mulloy* v. *United States*, 398 U. S. 410, 414–415 (1970).

until March 27, 1969, in order to be able to report for induction in another city where he was then living, and on that date he refused to submit to induction. He was thereafter tried and convicted of refusing to submit to a valid order to report for induction, and the Court of Appeals affirmed, 474 F. 2d 90 (1973).

In *Ehlert* v. *United States*, 402 U. S. 99 (1971), this Court reviewed a claim that a local Selective Service board, operating under laws and regulations substantially the same as those involved here, must reopen a registrant's classification following a claim for conscientious objector status made after issuance of an order to report for induction and based on an assertion that the registrant's conscientious objection to war in any form had "crystallized" after the issuance of the order to report. The Court reasoned that "[a] regulation explicitly providing that no conscientious objector claim could be considered by a local board unless filed before the mailing of an induction notice would . . . be perfectly valid" as a reasonable timeliness rule to insure that all possible claims be presented to and reviewed by the local board prior to its determination that a given registrant is subject to induction. *Id.*, at 101–102. The Court also concluded, however, that "those whose views are late in crystallizing" cannot "be deprived of a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria" that govern claims based on views crystallizing prior to issuance of induction notices. *Id.*, at 103. Such a full and fair opportunity, the Court found, existed in in-service armed services procedures for hearing and evaluating conscientious objector claims. Under such a system, the "intolerable" situation of a "no man's land" in which post-notice claims for CO classification were not heard by the local boards because of their timeliness rules, and were not heard by the Army after in-

duction because of a finding that an inductee had waived his right to claim such classification, was avoided: claims crystallizing prior to issuance of an order to report must be directed to and are to be reviewed by local boards, while claims crystallizing thereafter are to be reviewed only by the Armed Forces after induction. *Id.*, at 104 n. 7.

Selective Service regulations, however, did not unambiguously create such a system, but left open the possibility that a classification be reopened after issuance of a notice to report if the local board "specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 CFR § 1625.2. Prior to *Ehlert*, the courts of appeals had divided on the question of whether late crystallization of conscientious objector views qualified as such a change. 402 U. S., at 101 n. 3. In *Ehlert*, we avoided the "theological" argument of whether, as a matter of law, a claim of late-crystallizing conscientious objection was a change over which "the registrant has no control." Rather, we held that in view of consistent administrative interpretation by the Government that changes envisaged by Regulation 1625.2 were limited to "objectively identifiable" and "extraneous" circumstances,[3] such an interpretation of the regulation would be adopted. *Id.*, at 105.

Finally, we considered in *Ehlert* whether "the conditions for the validity of such a rule . . . are met in practice." After reviewing Army regulations, Department of Defense Directives, and a letter from the General Counsel of the Department of the Army, we de-

[3] As examples of the sort of nonvolitional changes that Regulation 1625.2 was intended to allow, the Government has consistently cited and the Court in *Ehlert* mentioned an injury to the registrant, or death in his family making him the sole surviving son. *Ehlert* v. *United States*, 402 U. S. 99, 104 (1971).

termined that an inductee claiming late-crystallizing conscientious objector status would receive a full and fair opportunity to have his claim heard by Armed Forces personnel. *Id.*, at 106–107.

The petitioners in these cases make overlapping arguments in attempting to avoid the *Ehlert* precedent. First, relying on decisions and opinions of the First and Third Circuits,[4] they contend that the refusals of the local boards to reopen their classifications could be read as a "denial" of those claims and thus a bar to in-service review. In particular, they point to ¶ 3.b (2) of Army Regulation 635–20, not cited or discussed in the *Ehlert* opinion, which states that in-service claims for conscientious objector treatment will not be favorably considered when "[b]ased solely on conscientious objection claimed *and denied* by the Selective Service System prior to induction." (Emphasis added.) In the language of the First Circuit, "if the Army could have read the draft board's reasonless refusal to reopen as a 'denial' then [a registrant] might well have been placed in a mutual buck-passing situation where neither the draft board nor the Army would consider his claim on the merits." *United States* v. *Alioto*, 469 F. 2d 722, 727 (1972). *Ehlert*, the petitioners claim, did not deal with this problem because the board in that case had explicitly stated that it was not denying Ehlert's claim on the merits, but was refusing to reach those merits since no showing had been made of a " 'change in the registrant's status resulting from circumstances over which the registrant had no control.' " 402 U. S., at 100. Thus, they argue, the

[4] *United States* v. *Alioto*, 469 F. 2d 722 (CA1 1972); *United States* v. *Ziskowski*, 465 F. 2d 480 (CA3 1972); *United States* v. *Shomock*, 462 F. 2d 338 (CA3 1972). See also *United States* v. *Cotton*, 346 F. Supp. 691 (SDNY 1972); *United States* v. *Usdin*, 6 S. S. L. R. 3039 (EDNY 1972).

ambiguity of the board's refusal to reopen, taken together with current Army regulations, raises the specter of the kind of no man's land specifically found intolerable in *Ehlert*.

The petitioners misconstrue the reasoning and effect of our holding in *Ehlert*. In adopting the Government's interpretation of Regulation 1625.2 that a late crystallization was not a circumstance over which a registrant "had no control," the Court did not hold merely that a local board would be permitted to refuse reopening of a classification in such a situation,[5] but that it was without power to reopen under such circumstances. The mandatory language of Regulation 1625.2, that classification "shall not be reopened" unless the proviso is met, requires no less. If a local board is not empowered to reopen the classification, it follows that it is similarly without power to make any ruling on the merits of a registrant's claims, since such a ruling on the merits of a claim can be made only by a reopening, with concomitant rights in the registrant to a personal appearance and an administrative appeal of an adverse decision, see n. 2, *supra*. From this it follows that in no event can a mere refusal to reopen signify more than a recognition of lack of power to do so; it cannot and does not bear any significance as to the merits of a registrant's claim.

The petitioners further argue that while each board's action in these cases took the form of a refusal to reopen, the decision not to do so was in fact based on the board's consideration of the merits, and could be viewed

[5] Although the language of Regulation 1625.2 is permissive in stating that a local board "may" reopen if the prerequisites are met, in *Mulloy* v. *United States*, *supra*, we held that a board must reopen a classification if a prima facie case for a new classification has been made to the board and the timeliness requirements are met. 398 U. S., at 415–416.

as such by the Armed Forces.[6] The simple answer to this contention is that no matter what the boards' apparent motivations in refusing to reopen the petitioners' classifications may have been, the boards were simply without power to reopen, and an expressed or unexpressed indication of the boards' views of the claims cannot be deemed a denial of those claims on the merits.

As in *Ehlert*, we turn finally to a consideration of whether "the conditions for the validity of such a rule . . . are met in practice." Army Regulation 635–20, ¶ 3.b (2), *supra*, bars in-service review of a request for conscientious

[6] The petitioners in both of the present cases, relying primarily on *Miller* v. *United States*, 388 F. 2d 973 (CA9 1967), contend that by considering the merits of the claims for conscientious objector status the boards effected a "de facto reopening" which was merely clothed as a denial of reopening. In *Miller* and in the subsequent case of *United States* v. *Aufdenspring*, 439 F. 2d 388 (CA9 1971), the State Director, acting under since-rescinded Regulation 1625.3, independently ordered a reopening of the registrants' cases, thus circumventing the timeliness proviso contained in Regulation 1625.2 with respect to requests for reopening by registrants. The courts in those cases held that the local boards' refusals to reopen were procedurally impermissible, since in each case the refusal was based on a review of the substance of the registrant's claim and thus was in fact a refusal to reclassify without the procedural advantages to the registrant inherent in a reclassification, see n. 2, *supra*.

Those decisions were correctly distinguished by the Courts of Appeals in the present cases. Petitioner Musser's claim for a reopening and reclassification was based solely upon his own request, and thus the timeliness proviso of Regulation 1625.2 fully applied. In Waldron's case, the State Director recommended postponement and an interview in accordance with Local Board Memorandum 41. But the court found that this postponement was effected under the Director's authority given by Regulation 1632.2 to postpone any induction, rather than in the exercise of his authority under Regulation 1625.3 to cause a reopening; further, the court noted that the Director's suggestion of an interview could not in any event trigger a reopening under Regulation 1625.3 since the communication was not in writing, as that Regulation specifically required.

objector status if such a request has been "claimed and denied by the Selective Service System prior to induction." While the critical word "denied" might arguably be applied to a board's refusal to reopen a classification, it cannot be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that *Ehlert* has made clear that such a refusal can only be based on the board's lack of power to reopen in such a posture. We note that in a letter written by the General Counsel for the Department of the Army with respect to the then-pending case of *United States* v. *Shomock* and printed in the opinion of that case, 462 F. 2d 338, 345 n. 17 (CA3 1972), the General Counsel indicated that when a refusal to reopen is not based on a decision on the merits, a registrant may raise such a claim in the Army and will be given a full and fair hearing.[7] In the event that a local board in one way or another mani-

[7] The pertinent part of the General Counsel's letter is as follows:

"If the appellant had entered the Army in May 1969 under circumstances where the Selective Service System actually considered and denied his conscientious objector claim *on the merits*, he would not have been entitled to an in-service determination on the merits of his conscientious objector claim.

"If the appellant had entered the Army in May 1969 under circumstances where his local draft board *merely refused to reopen his classification because his asserted-views crystallized subsequent to the receipt of his induction notice*, in the view of the Department of the Army personnel responsible for administering the conscientious objector claims of in-service members, he would have been entitled under Army policy to an in-service determination on the merits of his conscientious objector claim." 462 F. 2d, at 345. (Emphasis added.)

Although the letter interpreted and reported policies in effect at the time of Shomock's ordered induction, there appears to have been no significant change of policy at the time of the ordered inductions in these cases.

fests its views as to the sincerity of a late-crystallizing registrant's claims, as in the case of the petitioner Musser, or expresses any other conclusion concerning the merits of his claims, such expressions must be given no effect by the Armed Forces in reviewing an in-service conscientious objector request.

It follows that the Courts of Appeals in these cases correctly ruled that the petitioners' orders to report for induction were valid. The motion of the petitioner Waldron for leave to proceed *in forma pauperis* and the petitions for certiorari are granted, and the judgments are

Affirmed.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant these petitions and set these cases for oral argument.

MR. JUSTICE DOUGLAS, dissenting.

In *Ehlert* v. *United States*, 402 U. S. 99 (1971), the Court decided that the Selective Service System may place special hurdles on conscientious objector claims first raised after a notice of induction has been issued. In allowing the Selective Service to set what it termed reasonable "timeliness" regulations, the Court assumed that the conscientious objector claims not considered by the local board would receive full consideration by the military after induction. *Id.*, at 107. "[I]f . . . a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria, . . . a wholly different case would be presented." *Ibid.* I dissented in *Ehlert*, arguing that under the regulations of the Selective Service System the local boards should consider the claim as arising from a circumstance over which

the registrant has no control, and that civilian rather than military adjudication of these claims should be preferred. *Id.*, at 108. But apart from my own views on that question, the decisions affirmed in today's *per curiam* are highly questionable, since they appear to be that "wholly different case."

Neither petitioner in these cases received a full administrative review of the conscientious objector claims presented to his local board. But in each case the board purported to look into the claim. In Musser's case the board made an explicit finding that his beliefs were not "sincere"—a finding which one judge below found to be without basis. In Waldron's case no explicit finding on the merits was made, yet the board postponed his induction and interviewed him after the State Director recommended this course following his review of Waldron's file. Waldron's claim was not specifically denied as untimely. Thus in each case it would appear that either explicitly or implicitly some evaluation of the merits of the CO claim was made. But because the claims were considered late, neither petitioner was afforded the normal administrative appeal rights.[1] Such a result can be justified under *Ehlert* only if these claims are to receive full *de novo* consideration by the military. In challenging assurances that their claims will receive such consideration, the petitioners point to ¶ 3.b (2) of Army Regulation 635–20, which was not considered in *Ehlert*. It provides that "[r]equests for discharge after entering military service will not be favorably considered when . . . (2) [b]ased solely on conscientious

[1] If the board reopens the file, the registrant has the right after an adverse decision to a personal appearance before the board and appeal. Since here the files were not considered reopened, the petitioners had no such rights. Compare 32 CFR § 1625.4 with 32 CFR § 1625.13.

objection claimed and denied by the Selective Service System prior to induction."

The issue, then, is whether the actions of petitioners' local boards may constitute, in the Army's view, denial of the CO claim, thus barring its consideration by the Army. On its face the regulation would surely allow this construction. Such a possibility could perhaps have been avoided if the local boards in these cases had explicitly based their actions on the claims being untimely, as the Board in *Ehlert* did. But the boards here did not do this, and indeed in Musser's case purported rather clearly to reject the claim on the merits. These cases are thus different from the petitioner's in *Ehlert*. With the local board's actions here at best ambiguous, we cannot know that the Army will consider the claims.

The majority emphasizes that in the circumstances of these cases the local boards were without authority to reopen the classifications and consider the claims on the merits. That is, of course, now the law. But while this rule effectively forecloses registrants from the procedural rights within the Selective Service System that a reopening would afford, it cannot guarantee that the Army will afford the registrant a full hearing on his claims. That will depend upon the Army's application of its own regulations to these facts.[2]

[2] Unlike *Ehlert*, in these cases we have no assurances from the Army that the registrants will receive a hearing. The majority refers to a letter from the Army's General Counsel lodged with the Court of Appeals in *United States* v. *Shomock*, 462 F. 2d 338, 345 n. 17 (CA3 1972). But this letter does no more than distinguish between claims denied by the Selective Service System on the merits and those not considered because the board did not reopen the classification; only the latter will receive a hearing in the Army. But there is no assurance that in the confused circumstances of these cases the Army will not consider these claims to have been denied on the merits.

Indeed, even if we assume that the Army will on its face grant petitioners' claims *de novo* consideration, we in fact have no way of discovering whether *sub silentio* some weight will be accorded the prior proceedings of the draft boards. Yet those proceedings are deserving of no weight whatsoever since petitioners were foreclosed from the administrative appeal ordinarily allowed.

The opinions summarily affirmed today conflict squarely, as the Solicitor General concedes, with decisions in the First, Second, and Third Circuits. *United States* v. *Alioto*, 469 F. 2d 722 (CA1 1972); *United States* v. *Shomock*, 462 F. 2d 338 (CA3 1972); *United States* v. *Ziskowski*, 465 F. 2d 480 (CA3 1972); *United States* v. *Jerrold*, 480 F. 2d 1293 (CA1 1973); *United States* v. *Folino*, No. 72–1974, CA3 June 29, 1973; *United States* v. *Cotton*, 346 F. Supp. 691 (SDNY 1972); *United States* v. *Usdin*, 6 S. S. L. R. 3039 (EDNY 1972). At a minimum we should have set these cases for argument and full briefing.